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No. 79-230

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN KLEINSCHMIDT and MICHAEL SORRENTINO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioners contend that the search of their vessel and the seizure of marijuana from it violated their Fourth Amendment rights.

1. Following a jury-waived trial in the United States District Court for the Southern District of Florida, petitioners were convicted of possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Petitioner Kleinschmidt was sentenced to three years' imprisonment to be followed by a special parole term of two years. Petitioner Sorrentino was sentenced to four years' imprisonment to be followed by a special parole term of two years. The court of appeals affirmed per curiam (Pet. App. 9-17).

On the evening of December 30, 1977, United States Customs Patrol Officer Settles was in command of a customs patrol vessel in Port Everglades Cut, Fort Lauderdale, Florida (Tr. 6-7).[1] At 11:30 p.m., a customs officer on duty in a naval observation tower ashore radioed the customs vessel that a boat entering Port Everglades Cut "looked good," that it had not been seen going out that night, and that it was large enough to be capable of foreign travel (Tr. 6-8, 20). Acting in response to this message, Officer Settles approached the unknown vessel and saw that it was wallowing as if carrying a heavy cargo (Tr. 9, 35, 38, 45, 62), but that the waterline mark was too high for a heavy load (Tr. 9-10, 37, 39-40, 47). Officer Settles also observed that the cabin area of the boat was dark, that canvas covered its front windshield, and that two individuals were standing on the flying bridge (Tr. 9).

As Officer Settles watched the boat, it turned from west to north, heading toward a dock (Tr. 32-34, 45). The officer pursued the boat and saw that its name was "Business Stinks" (Tr. 10, 40). Officer Settles ascertained that the "Business Stinks" had previously been identified by the Fort Lauderdale Police Department as suspected of carrying contraband (Tr. 11-13, 25). At this point, Officer Settles called to the boat, identified himself, and asked the boat's origin and whether there were registration papers on board. The individuals on the vessel did not respond to these inquiries (Tr. 13-14, 41).

Officer Settles, accompanied by Customs Patrol Officer Collins, then boarded the "Business Stinks." As Officer Settles proceeded to the bridge to check the boat's registration papers, he smelled what he believed to be

[1]"Tr." refers to the transcript of the April 6, 1978 suppression hearing.

marijuana (Tr. 14-15; Pet. App. 13). Officer Collins, while approaching the cabin to determine whether anyone else was on board, also smelled marijuana. He then opened the cabin door and discovered a large number of bales of marijuana (Tr. 14-15, 74, 84). At that point, petitioners were arrested (Tr. 14).

In denying petitioners' motion to suppress the evidence seized as a result of the search of the cabin, the district court, upholding the finding of a magistrate, justified the customs officers' actions as a border search (Pet. App. 1-7) or alternatively as the legitimate fruit of an investigatory stop (*id.* at 14). The court of appeals rejected the border search rationale but held that the officers were lawfully on board the vessel pursuant to an investigatory stop and that probable cause and exigent circumstances justified the search of the cabin (*id.* at 14-15).

2. Petitioners' contention (Pet. 9) that the customs officers' search of their vessel and seizure of the marijuana violated their Fourth Amendment rights is insubstantial.

Although the court of appeals stated (Pet. App. 14) that customs officers have authority under 19 U.S.C. 1581(a) to stop and board vessels in customs waters without suspicion of illicit activity, it did not rest its decision on that ground.[2] Instead, the court below found that the

[2]There is thus no occasion to consider petitioners' claim (Pet. 8) that the Ninth Circuit has accorded citizens a greater "expectation of privacy" in customs waters than the Fifth Circuit has. In any event, the cases cited by petitioners are of no help to them. *United States* v. *Solmes*, 527 F. 2d 1370 (9th Cir. 1975), and *United States* v. *Stanley*, 545 F. 2d 661 (9th Cir. 1976), upheld the searches as having taken place at the functional equivalent of the Mexican border, thus dispensing with the need for probable cause (see *United States* v. *Ramsey*, 431 U.S. 606, 616-619 (1977)). *United States* v. *Tilton*, 534 F. 2d 1363 (9th Cir. 1976) remanded the case to the district court for further findings on the border issue; it did not address the question whether, if the search had not taken place at the border, reasonable suspicion or probable cause would have been required in order to search.

totality of the circumstances "provide[d] reasonable suspicion of wrongdoing sufficient to justify an investigatory stop and boarding" of petitioners' vessel (Pet. App. 15). Once the officers were legally aboard, the odor of marijuana provided probable cause to search the vessel further, and the vessel's inherent mobility, in addition to other factors noted by the court of appeals, provided the exigent circumstances justifying the absence of a search warrant (*ibid.*).

The court of appeals' application of settled principles to the particular facts of this case is correct, and further review is unwarranted. Petitioners concede that customs officers have a statutory right to board vessels in customs waters (Pet. 9), that the officers here were acting pursuant to that authority (*ibid.*), and that Officer Settles' actions in proceeding to the bridge to question the crew were proper (Pet. 11). Petitioners' quarrel is with the actions of Officer Collins, who, they assert, "searched the cabin * * * merely because he had boarded the vessel" (Pet. 15). But Officer Collins, no less than Officer Settles, was lawfully aboard petitioners' boat, and the court of appeals found that he smelled marijuana before he opened the cabin door (Pet. App. 13). Petitioners do not dispute, nor could they, that the smell of marijuana in these circumstances provided probable cause for further search. See, *e.g.*, *United States* v. *Holbrook*, 571 F. 2d 335 (5th Cir. 1978).

In any event, the evidence shows that Officer Settles also smelled marijuana as he was proceeding to the bridge (Pet. App. 13).[3] Since petitioners have conceded that

[3]Petitioners argue (Pet. 11 n.1) that the evidence shows that Officer Settles did not smell marijuana until after Officer Collins had opened the cabin door, but the court of appeals was unpersuaded (Pet. App. 13).

Officer Settles was acting lawfully, and since they do not dispute that the smell of marijuana furnishes probable cause to search in these circumstances, their claim on this record reduces to an assertion that Officer Settles, not Officer Collins, should have conducted the search. This is not a substantial question.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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